Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation,	)	CC Docket No. 97-208
BellSouth Telecommunications, Inc.	)	
and BellSouth Long Distance, Inc.	)	
for Provision of In-Region, InterLATA	)	
Services in South Carolina	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

MCI addresses in these Reply Comments two points: (i) the argument of the South Carolina Public Service Commission ("SCPSC") that this Commission should "affirm" the SCPSC's finding of checklist compliance (SCPSC Comments at 16); and (ii) the position of the Department of Justice that it is unable to determine whether BellSouth can apply for interLATA entry under Track B because it is not clear whether competing local exchange carriers ("CLECs") such as DeltaCom have taken "reasonable steps" toward becoming facilities-based providers of residential service. Department of Justice Evaluation ("DOJ Eval.") 10.

I. THE SCPSC'S ORDER SHOULD BE DISREGARDED BECAUSE IT IS A WHOLESALE ADOPTION OF BELLSOUTH'S PROPOSED FINDINGS WITHOUT CONSIDERATION OF OVERWHELMING CONTRARY EVIDENCE, IN CONTRAST TO THE INDEPENDENT ANALYSIS OF THE SAME EVIDENCE BY THE DEPARTMENT OF JUSTICE AND THE FLORIDA PUBLIC SERVICE COMMISSION.

The SCPSC suggests that in its July 31 order it "carefully weigh[ed] all the available evidence." SCPSC Comments at 4. The SCPSC's order should, however, be seen for what it is -- a wholesale reproduction of BellSouth's wish list of "findings" without *any* weighing of

evidence. See MCI's Initial Comments at 9-10. Should there be any question as to how an *independent* analysis can and should be conducted, the Commission need only compare the SCPSC's adoption of BellSouth's proposed order to two more recent, thorough, and independent analyses of BellSouth's checklist compliance. First, on November 4, 1997, the United States Department of Justice issued its evaluation of BellSouth's application, finding, among other things, that:

- BellSouth's OSS falls "well short of satisfying the standards articulated by the FCC" (DOJ Eval. 28 & App. A);
- the SCPSC failed to use *any* cost methodology or provide any reasoned explanation as to how the interim prices are cost-based (DOJ Eval. 41-42);
- BellSouth has failed to satisfy checklist requirements relating to unbundled elements because it has nowhere shown how it is offering unbundled elements in a manner that allows requesting carriers to combine them, let alone in a legally binding document (DOJ Eval. 19-23) -- an issue the SCPSC did not even address;
- BellSouth is not making available numerous important performance measurements needed to establish that it is providing, and will continue to provide, service to competing carriers on reasonable and nondiscriminatory terms (DOJ Eval. 45-48 & Ex. 3 (Affidavit of Michael J. Friduss)) -- another clear requirement of this Commission's Michigan Order that the SCPSC chose to ignore; and
- the premise of the SCPSC's decision and BellSouth's application -- that allowing BellSouth into the long-distance market before the local market is irreversibly opened to competition will enhance local competition and consumer welfare -- is fundamentally flawed. "BellSouth and its economic experts significantly overvalue the benefits of the BOC's long distance entry now, and undervalue the benefits to be gained from opening BellSouth's local markets." DOJ Eval. 48; see generally id. at 48-50 & Supplemental Affidavit of Marius Schwartz (DOJ Eval. Ex. 2).

The Commission has firmly established that the Department's findings on *all* these issues are entitled to "substantial weight." Michigan Order ¶ 37; 47 U.S.C. § 271(d)(2)(A).

Second, on November 3, following a thorough review of BellSouth's region-wide OSS and

other systems needed for checklist compliance, the Florida PSC voted to affirm its staff's findings that BellSouth's region-wide OSS is deficient in multiple respects and that BellSouth has not satisfied multiple checklist requirements.[1] In contrast to the SCPSC, the Florida PSC based its decision on an extensive evidentiary proceeding culminating in its staff's 311-page analysis of the evidence. See Staff Memorandum, Docket No. 960786-TL, Florida PSC (Oct. 22, 1997). Notably, the Florida hearing occurred nearly two months *after* the South Carolina hearing, and thus involved OSS and other systems BellSouth claimed to have improved upon since the South Carolina hearing. The Florida staff found multiple deficiencies with the same region-wide systems BellSouth intends to use in South Carolina, including:

- BellSouth's "LENS" OSS interface for CLECs is discriminatory and does not come close to providing access to pre-ordering information in essentially the same time and manner as does BellSouth's internal OSS systems. Among other defects identified by the Florida staff, LENS requires excessive human intervention, allows BellSouth to reserve more telephone numbers than CLECs are able to reserve; and requires cumbersome and inefficient methods of locating product and service information selected by the customer (Staff Mem. pp. 112-14);

- BellSouth does not provide installation intervals for CLECs at parity with what BellSouth provides itself (Id. at 121);

- BellSouth has not provided requesting carriers with the technical specifications of its EDI ordering system (Id. at 117); and

- BellSouth has not developed performance standards and measurements adequate to monitor nondiscriminatory provision of UNEs, resale services, and access to OSS functions. The performance target intervals BellSouth established are not adequate to monitor BellSouth's performance to CLECs. The measurements proposed by the Local Competition User's Group (submitted as Exhibit G to MCI's Initial Comments) are a good starting point to measure and monitor discrimination. (Id. at 137-150).

[1] The Florida PSC's written order is expected to be issued within the next week.

These and dozens of other defects -- most of which are identical to those raised in this proceeding -- are discussed at length in the Florida staff's analysis. This Commission has emphasized the relevance of experience with a BOC's region-wide systems in other states in its region. Michigan Order ¶ 156. Indeed, BellSouth itself relies heavily on its region-wide experience. See, e.g., BellSouth Application at 19, 23, 27, 31, 34-35, 42, 44-47, 55. The Commission should therefore carefully weigh the findings of the Florida PSC -- particularly its consideration of evidence contradicting BellSouth's claims in this proceeding.

II. THE DEPARTMENT OF JUSTICE IMPROPERLY FOCUSED ON CLECS' PLANS, EFFORTS AND INTENTIONS IN ANALYZING WHETHER BELLSOUTH MAY BE ENTITLED TO PROCEED UNDER TRACK B.

In its Evaluation of BellSouth's application, the Department of Justice stated that it was unable to determine from the record whether BellSouth was entitled to seek interLATA approval under Track B. DOJ Eval. 8, 11. (The Department readily concluded, however, that BellSouth has not met the requirements of either Track A or Track B because it falls well short of satisfying the competitive checklist. DOJ Eval. 12-30). Notably, the Department expressed no uncertainty as to whether BellSouth satisfied any of the three express conditions Congress included in the Act pursuant to which a BOC may proceed under Track B; i.e., the Department did not question the fact that BellSouth had received requests for access and interconnection, including requests to provide facilities-based service to residential and business customers, and the Department acknowledged that there has been no finding by the SCPSC (let alone any allegation) that all requesting carriers negotiated in bad faith or failed to meet implementation schedules in their interconnection agreements. DOJ Eval. 5 n.3; see 47 U.S.C. § 271(c)(1)(B).

Nevertheless, the Department expanded greatly on one sentence of dictum from the Commission's Oklahoma Order in concluding that it was unclear whether BellSouth could qualify for Track B under a fourth exception -- an exception Congress did not include in the Act. Specifically, the Department stated that it was unclear whether any CLEC in South Carolina has taken "reasonable steps" toward providing residential service "within a specified and reasonable time frame," and that not enough information is available as to CLECs' "plans," "intentions," and "efforts." DOJ Eval. 8, 10.

Application of such a test would constitute clear legal error and bad policy. The fact that Congress did not include this exception to the Track A route is reason enough to reject it. Although the Commission can interpret ambiguities in existing exceptions, it is not free to create new ones or to second guess the judgment of Congress. Congress has already considered and created a legislative solution to the supposed problem the "reasonable steps" test is intended to address. The apparent concern is that Track B could be foreclosed "indefinitely" by inaction of CLECs, "contrary to the purpose of Track B." DOJ Eval. 10. Congress addressed precisely that concern. But rather than including an amorphous test involving a unilateral examination of CLECs' "intentions and efforts" (DOJ Eval. 10), Congress enacted an equitable, eminently sensible, and easily applied test that protects against CLEC inaction without requiring any amorphous predictive judgments of "reasonable steps" that would only further encourage BOCs to delay CLEC progress.

First, Congress decided that Track B should be available if CLECs do not even *request* access and interconnection. As the Commission has noted, the request that forecloses Track B must be a request for Track-A-type service, i.e., a request for predominantly facilities-based service. Oklahoma Order ¶ 54. Because this condition focuses only on the *nature of the request,* and not on

implementation of the request, the determination whether it is satisfied must be made from the face of the interconnection agreement, without any "predictive judgments." The simple question is whether facilities-based residential and business service have been requested. Because Congress limited this part of the standard solely to a determination of whether a facilities-based request had been made, it would be error to read into that condition any requirement for examining CLECs' plans, efforts and intentions. This is particularly so because Congress separately dealt with the question of CLEC *implementation* of a request, as we now discuss.

Congress did not allow CLECs merely to make a request and thereafter remain inactive, thereby disqualifying a BOC for the Track B route. Once CLECs have made requests, they must follow through by negotiating in good faith. If the requesting CLECs fail to do so (and a state commission so certifies), Track B is available. But what if CLECs, having negotiated in good faith, sit still rather than implementing their interconnection agreements? It is this scenario that proponents of a "reasonable steps" espouse as if Congress never addressed the issue. To the contrary, section 271(c)(1)(B) of the Act allows a Track B application if requesting carriers "fail[] to comply, within a reasonable period of time, with the implementation schedule contained in such [interconnection] agreement." It is this condition, *and only this condition*, that calls for an analysis of CLEC progress.

In enacting this solution, Congress chose to apply an objective test for assessing whether CLECs were boycotting a particular market. This test looks to a specific schedule negotiated by the parties or ordered by a state commission rather than an ill-defined "predictive judgment" of CLEC progress, efforts and plans. This is the only sensible solution not only because it is more workable than reading the minds of CLECs, but, more importantly, because it recognizes that CLEC progress is inextricably linked to the BOCs complying with their obligations to open local markets to

competition. Instead of assessing CLEC progress in a vacuum and ignoring the economic reality that most competitors do not make unconditional business plans -- *particularly to enter a market where there is not yet any prospect for effective competition because of the actions of an entrenched monopolist* -- Congress tied the assessment of CLEC progress to the fulfillment of the terms of interconnection agreements that require the ILECs to open their markets.

Indeed, as noted by the South Carolina Consumer Advocate (Comments at 3), the Act *requires* state commissions to include implementation schedules in interconnection agreements. 47 U.S.C. § 252(c)(3). Because BellSouth failed to propose, and the SCPSC did not impose, an implementation schedule (which necessarily would tie implementation by CLECs to compliance by BellSouth), they are in no position to insist that the Commission excuse these statutory requirements in favor of an ill-defined, unilateral assessment of CLEC progress that invites BellSouth to continue to slow roll CLECs and delay competition.

Moreover, it is entirely unreasonable to expect CLECs such as MCI, ACSI or DeltaCom to be able to provide any more certainty as to their plans to serve any particular class of customers in South Carolina, given the extensive deficiencies the Department of Justice identified with BellSouth's checklist compliance. The Department noted that CLECs have no idea what the cost of local entry will be two months from now; that there is no information as to how BellSouth will provide access to unbundled elements for CLECs to combine, and on what terms; and that BellSouth's OSS falls well short of giving CLECs a fair opportunity to compete. DeltaCom, for example, is already taking substantial risks with its announced facilities-based plans and investments in light of the tremendous business uncertainty caused by BellSouth's failure to comply with the Act.

It is also important to note that the stated purpose of a "reasonableness" inquiry is to

determine whether CLECs are improperly trying to delay BOC entry (although the BOCs have never explained why a non-IXC CLEC would even have a theoretical incentive to do so), or are properly deferring additional facilities-based plans until the BOC becomes more cooperative in opening its market. In a case where a BOC is at least close to making the requisite checklist items available, a "reasonable steps" test would inevitably require the Commission to engage in a full-blown business case analysis to second-guess the CLECs' business decisions. Is the CLEC properly weighing factors such as whether it can hope to gain a return on its investment in light of the prices of network elements; what steps and costs the BOC has imposed for access to its network in order to combine elements; whether the BOC will cooperate in opening its market by providing to CLECs previously combined elements; what business risks are presented by BOC challenges to various aspects of the Act and Commission regulations, and lower court rulings on these challenges; and what residential strategy should be chosen in light of these uncertainties and historic losses of hundreds of millions of dollars in local markets?

If the Commission is setting out to determine whether the contingent nature of CLECs' entry plans is motivated by a desire to keep BOCs out of the long-distance market or legitimate business risks attributable to BOC actions, can it do anything less than a full blown business-case analysis? These inevitable problems with attempting to fairly administer a "reasonable steps" standard suggest why Congress chose an objective test that looks only to implementation of contractual schedules. Although the Commission should be very concerned about the difficulty of fairly administering a "reasonable steps" standard in the future, it need not consider the issue in this proceeding because BellSouth is not yet close to making critical checklist items available.

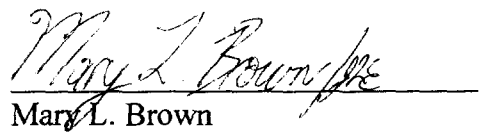
It is simply impossible to square the Department's uncertainty as to whether DeltaCom has

progressed far enough with the Department's separate, emphatic findings that there are tremendous uncertainties and risks facing CLECs in South Carolina. The Department specifically found that neither current nor future prices will permit efficient firms to enter the market and compete effectively (DOJ Eval. 43-44), that BellSouth's failure to establish that it will offer unbundled elements in a manner that will allow other carriers to combine them has "substantial implications for the development of competition in South Carolina" (DOJ Eval. 23), and that the Eighth Circuit's recent decision vacating rule 51.315(b) "has created great uncertainty about the manner in which unbundled elements will be provided to CLECs, and in turn, the costs that CLECs will incur in combining them in order to provide services" (DOJ Eval. 24). Under these circumstances, even if the Commission were empowered to enact a nonstatutory "reasonable steps" exception to Track A, the only rational conclusion that can be drawn is that the steps DeltaCom and other CLECs have taken, and the necessarily contingent plans they have announced, are more than reasonable until BellSouth's gross failures to comply with the Act are resolved. Moreover, even if a "reasonable steps" test had been included in section 271, any uncertainty on the issue must be resolved against BellSouth, which has the burden to prove it has met each element of section 271. Michigan Order ¶¶ 43-44. BellSouth has not come close to meeting its burden to prove that DeltaCom and all other CLECs have acted unreasonably given the current state of BellSouth's checklist compliance.

CONCLUSION

For the foregoing reasons, and the reasons set forth in MCI's initial comments, BellSouth's application to provide in-region, interLATA services in South Carolina should be denied.

Respectfully submitted,



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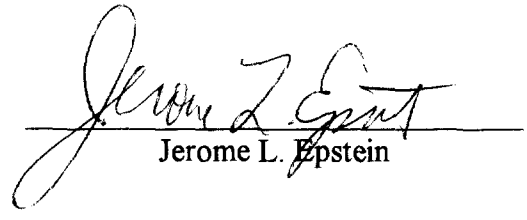
November 14, 1997

CERTIFICATE OF SERVICE

I, Jerome L. Epstein, hereby certify that I have on this 14th day of November 1997, caused a true copy of the foregoing "Reply Comments of MCI Telecommunications Corporation" to be served upon the parties on the attached list by hand, except where noted by Federal Express.



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